Transmile Group Bhd & Anor v Malaysian Trustees Bhd & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING PETITION NO D-26NCC-30 OF 2011
NALLINI PATHMANATHAN J
19 DECEMBER 2012

Companies and Corporations — Arrangement, scheme of — Court approval — Petition for court's sanction — Claim for cost of petition — Objections raised challenging petition — Whether there were merits in objections raised — Whether objections artificial and contrived primarily to delay sanction — Whether objections raised to assist court — Objectors ordered to pay cost of petition — Companies Act 1965 s 176

The petitioners had filed an application pursuant to s 176 of the Companies Act 1965 at the High Court for orders, inter alia, to convene class meetings of the scheme creditors. At that hearing a preliminary issue was brought before the court namely whether amounts owed by second petitioner ('TAS') to Malaysian Trustees Bhd ('MTB') enjoyed priority over the quantum owed to the second to 13th respondents. The High Court held that the amounts owed by TAS to MTB enjoyed no such priority and that all respective debts ranked pari passu for the purposes of the proposed scheme of arrangement between TAS and its scheme creditors. MTB did not succeed in its appeals. A petition for sanction was filed subsequent to both schemes of arrangement being approved by the required statutory majority and the sanction was granted for the petitioners' schemes of arrangement. The issue of costs of the petition now arose for determination. The petitioners and the second to 13th and 14th respondents sought costs from MTB on an indemnity basis, maintaining that all objections raised in respect of the petitioners' application for sanction were artificial and contrived primarily to delay the grant of sanction. MTB on the other hand maintained that its presence and the issues raised were so done primarily for the assistance of the court.

Held, ordering MTB to pay costs to the petitioners and to the second to 14th respondents:

(1) The general approach adopted by a court under the Companies Act for sanction applications is that the company will bear the costs of the application, even if the opposing creditor is unsuccessful. The rationale being that the court welcomes the helpful assistance on the issues before the court in proceedings which deal with and are for the benefit of class rights. While this is the general approach, the court has the final discretion in awarding costs. The general approach applies to objections

which have been of some assistance or which have not 'lacked all substance' or which are not frivolous or which are of no assistance to the court and have served to delay the proceedings (see para 14).

(2) The matter therefore turned on a consideration of the nature of MTB's objections and the manner in which they were put forward. If there was reasonable and justifiable basis for the objections and they served to clarify and assist the court to evaluate the scheme more fully then the costs ought to be borne by the company. If however, the objections lacked substance, were prolix, and calculated to delay the sanctioning of the scheme then the costs ought not to be borne by the company in keeping with the general approach, but ought to be borne by MTB (see para 21).

(3) MTB's opposition to the sanctioning of the scheme had caused considerable delay and the incurring of significant costs as additional cause papers had to be filed and research undertaken to meet the new points raised. Considerable judicial time was also undertaken in considering these various issues. Ultimately the court found that there was no merit in these objections and granted sanction. They did not appear to be objections taken with a view to genuinely evaluating the scheme, but rather with a view to stultifying or delaying the sanctioning of the scheme and seeking to procure priority in its own interests. Hence, this was not a proper case in which to adopt the general approach. Many of the objections taken were lacking in substance or devoid of merit, and noticeably so. It follows therefore, that this was a fit and proper case for the court to make cost orders against the objector, namely MTB (see paras 22–23 & 26).

(4) Costs should be ordered against MTB on a standard basis order. The court decided against the award of costs on an indemnity basis for the reason that although a great many of the objections were devoid of merit, there were some objections that were genuinely taken with a view to assisting the court. The fact that it was ultimately determined that those objections lacked merit did not in itself warrant an inference that all objections were taken mala fide (see para 27).

[Bahasa Malaysia summary

Pempetisyen-pempetisyen telah memfailkan permohonan berikutan s 176 Akta Syarikat 1965 di Mahkamah Tinggi untuk perintah-perintah, antara lain, untuk mengadakan mesyuarat kelas skim pemiutang. Pada masa pendengaran tersebut isu awalan dikemukakan di hadapan mahkamah iaitu sama ada jumlah yang dihutang oleh pempetisyen kedua ('TAS') kepada Malaysian Trustees Bhd ('MTB') menikmati keutamaan ke atas kuantum yang dihutang kepada responden-responden kedua hingga ke-13. Mahkamah Tinggi memutuskan bahawa jumlah yang dihutang oleh TAS kepada MTB tidak menikmati keutamaan sedemikian dan bahawa kesemua hutang

masing-masing diletakkan pari passu bagi tujuan penyusunan skim yang dicadangkan antara TAS dan skim pemiutang-pemiutangnya. MTB tidak berjaya dalam rayuannya. Petisyen untuk sanksi difailkan selepas kedua-dua skim penyusunan diluluskan oleh majoriti statutori yang diperlukan dan sanksi tersebut dibenarkan untuk skim penyusunan pempetisyen-pempetisyen. Isu kos petisyen sekarang berbangkit untuk penentuan. Pempetisyen-pempetisyen dan responden kedua hingga ke-13 dan ke-14 memohon kos daripada MTB atas dasar indemniti, mengekalkan bahawa kesemua bantahan yang dibangkitkan berkaitan permohonan pempetisyen-pempetisyen untuk sanksi adalah palsu dan dibuat terutamanya untuk melambatkan pemberian sanksi. MTB sebaliknya mengekalkan kehadirannya dan isu-isu yang berbangkit dilakukan terutamanya untuk mendapatkan bantuan mahkamah.

Diputuskan, memerintah MTB membayar kos kepada pempetisyen-pempetisyen dan kepada responden-responden kedua hingga ke-14:

(1) Pendekatan am yang digunakan oleh mahkamah di bawah Akta Syarikat untuk permohonan sanksi adalah bahawa syarikat akan menanggung kos permohonan, walaupun pemiutang lawan tidak berjaya. Rasionalnya adalah bahawa mahkamah mengalu-alukan bantuan berguna atas isu di hadapan mahkamah dalam prosiding yang menguruskan dan untuk faedah hak-hak kelas. Sementara ini adalah pendekatan am, mahkamah mempunyai budi bicara muktamad dalam mengawardkan kos. Pendekatan am diguna pakai kepada bantahan yang telah menjadi sebahagian bantuan atau yang tidak 'lacked all substance' atau yang tidak remeh-temeh atau yang tidak memberi bantuan kepada mahkamah dan yang telah melambatkan prosiding (lihat perenggan 14).

(2) Perkara itu beralih kepada pertimbangan sifat bantahan MTB dan cara di mana ia dikemukakan. Jika terdapat asas yang munasabah dan berjustifikasi untuk bantahan dan ia bertindak untuk menjelaskan dan membantu mahkamah menilai skim tersebut dengan sepenuhnya oleh itu kos patut ditanggung oleh syarikat. Walau bagaimanapun jika bantahan tidak kukuh, meleret-leret, dan dikira untuk melambatkan persetujuan skim oleh itu kos tidak patut ditanggung oleh syarikat yang mengekalkan dengan pendekatan am, tetapi patut ditanggung oleh MTB (lihat perenggan 21).

(3) Penentangan MTB kepada pemberian sanksi skim tersebut telah menyebabkan kelewatan yang substansial dan telah melibatkan kos yang ketara sebagai 'cause papers' tambahan yang terpaksa difailkan dan penyelidikan dibuat untuk memenuhi poin-poin baru yang dibangkitkan. Masa kehakiman yang substansial juga diambil dalam mempertimbangkan pelbagai isu ini. Akhirnya mahkamah mendapati

bahawa tidak terdapat merit dalam bantahan ini dan memberikan sanksi. Ia tidak seperti bantahan yang diambil dengan tujuan untuk menilai dengan betul skim tersebut, tetapi dengan tujuan untuk membuntukan atau melengah-lengahkan pemberian skim dan mendapatkan keutamaan untuk kepentingannya. Maka, ini adalah bukan kes betul untuk menggunakan pendekatan am. Banyak bantahan yang diambil tidak kukuh atau tidak mempunyai merit, dan memang nyata. Oleh itu, kes ini adalah kes yang tepat dan sesuai untuk mahkamah membuat perintah kos terhadap pembantah, iaitu MTB (lihat perenggan 22–23 & 26).

(4) Kos patut diperintahkan terhadap MTB atas dasar perintah *standard basis order*. Mahkamah memutuskan terhadap award kos atas dasar indemniti atas alasan bahawa walaupun banyak bantahan tidak mempunyai merit, terdapat beberapa bantahan yang diambil secara betul dengan tujuan untuk membantu mahkamah. Hakikat bahawa ia telah ditentukan pada dasarnya bahawa bantahan tersebut tidak mempunyai merit tidak dengan sendirinya mewajarkan inferens bahawa kesemua bantahan adalah dianggap mala fide (lihat perenggan 27).]

Notes

For cases on court approval, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 31–36.

Cases referred to

Ampol Ltd, Re (1989) 14 ACLR 772, SC (refd)
Arrowfield Group Ltd, Re (1995) 17 ACSR 649, SC (refd)
Castlereagh Securities Ltd, Re [1973] 1 NSWLR 624, HC (refd)
De La Rue (Thomas) & Co Ltd and Reduced, Re [1911] 2 Ch 361, Ch D (refd)
Matine Ltd, Re (1998) 28 ACSR 492, SC (folld)
NRMA Ltd No 5131 of 1999, Re (2000) 33 ACSR 595, SC (folld)
Royal & Sun Alliance v British Engine and others [2006] EWHC 2947, Ch D (refd)

Legislation referred to

Companies Act 1965 s 176
Companies Act 1985 [UK] s 425
Rules of Court 2012 O 59 rr 2, 3, 3(2), 8, 16, 16(1), (1)(a), (b), (c), (d), (2), (3), (4)

S Suhendran (Tarvina Hussein with him) (Kadir Andri & Partners) for the petitioner.
Paul Ngooi (Soo Li Ching with him) (Lim Kian Loong & Co) for the first respondent.
Rabindra Nathan (Lukas Lim with him) (Shearn Delamore & Co) for the second to 13th respondents.

Nallini Pathmanathan J:

[1] This decision relates to the issue of costs arising from the petition by the first petitioner ('TGB') and second petitioner ('TAS') to sanction schemes of arrangement between each of them as scheme companies and their respective creditors.

[2] The salient chronology of events leading up to this decision have been comprehensively set out in the submissions of learned counsel for the petitioners' as well as the respondents. I adopt and confirm the sequence of events leading up to the application for, and subsequent grant of sanction for the schemes, after a relatively protracted hearing over the course of several months.

[3] The matter originally commenced when the petitioners filed an application pursuant to s 176 of the Companies Act 1965 in Kuala Lumpur High Court Summons No D-24NCC-239 of 2010 for orders, inter alia, to convene class meetings of the scheme creditors. At that hearing a preliminary issue was brought before the court namely whether amounts owed by TAS to Malaysian Trustees Bhd ('MTB') enjoyed priority over the quantum owed to the second to 13th respondents.

[4] On 22 December 2010 the High Court held that the amounts owed by TAS to MTB enjoyed no such priority over the monies owed to the second to 13th respondents. The court further held that all respective debts therefore ranked pari passu for the purposes of the proposed scheme of arrangement between TAS and its scheme creditors. MTB did not succeed in its appeals.

[5] The issue of costs arises in respect of the petition for sanction which was filed on 29 April 2011 subsequent to both schemes of arrangement being approved by the required statutory majority. This court heard the parties on 29 November 2011, 5 December 2011 and 11 February 2012. On 20 February 2012, sanction was granted for the petitioners' schemes of arrangement with the issue of costs to be determined at a subsequent date. Thus the issue of costs now arises for determination.

[6] The petitioners and the second to 13th respondents as well as the 14th respondent seek costs from MTB on an indemnity basis, maintaining that all objections raised in respect of the petitioners' application for sanction were artificial and contrived primarily to delay the grant of sanction. MTB on the other hand maintains that its presence and the issues raised were so done primarily for the assistance of this court. MTB further points out that the role

of the court is supervisory in respect of the sanctioning of schemes of arrangement and that it actually assisted this court to make a proper and rigorous evaluation of the said schemes. As such it is contended that no order as to costs ought to be made and each party ought to bear its own costs.

THE LAW

[7] Under the Rules of Court 2012, the general principle that costs follow the event remains, (see O 59 r 3 of the Rules of Court 2012). Order 59 r 2 provides that subject to express provisions of written law and the Rules, the costs of and incidental to proceedings in the court shall be in the discretion of the court which shall have full power to determine by whom and to what extent the costs are to be paid.

[8] Order 59 r 3(2) stipulates that the court has in the exercise of its discretion in awarding costs shall generally order costs to follow the event except when it appears to the court that the circumstances of the case warrant the making of some other order in respect of the whole of, or a part of the costs. The court therefore has to exercise its discretion judicially in determining whether costs follow the event or whether there should be a departure from the general position.

[9] The court is entitled under O 59 r 8 to take into account 'special matters' as specified therein and one of which is the conduct of parties including before and during proceedings. This includes, as submitted by learned counsel for the second to 13th respondents, the manner in which a party has pursued his case or a particular issue, whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue and whether the parties attempted to resolve the matter.

[10] The basis of assessment of costs is set out in O 59 r 16(1) which sets out the items that the court is to have regard to in assessing costs. Order 59 r 16(2) provides that the amount of costs which a party is entitled to recover is the amount allowed after a determination on the standard basis where an order is made, inter alia, that the costs of one party to the proceedings is to be paid by another. However the proviso to sub-r (2) stipulates that the court may in appropriate circumstances order costs to be determined on an indemnity basis. It follows from the foregoing that the normal mode of assessment is the standard basis with the court taking into account the items set out in O 59 r 16, unless the circumstances are such as to warrant the grant of costs on an indemnity basis.

[11] The difference between the modes of assessment ie on a standard basis and on an indemnity basis are set out in O 59 r 16(3)–(4) respectively. The

standard basis entails allowing a reasonable amount in respect of all costs reasonably incurred. The indemnity basis allows for all costs except for costs of an unreasonable amount or which have been unreasonably incurred to be borne by the cost paying party. It is on this latter basis that the petitioners and respondents collectively seek costs from MTB, setting out in their written submissions in considerable detail, the basis for seeking costs on such basis.

The general approach in applications to court for sanction of schemes of arrangement

[12] As set out by learned counsel for the petitioners, the general approach adopted by a court under the Companies Act for sanction applications is that the company will bear the costs of the application, even if the opposing creditor is unsuccessful. The rationale being that the court welcomes the helpful assistance on the issues before the court in proceedings which deal with and are for the benefit of class rights, (see *Royal & Sun Alliance v British Engine* [2006] EWHC 2947 at para 23).

[13] And in *Re De La Rue (Thomas) & Co Ltd and Reduced* [1911] 2 Ch 361 at p 367/8, as submitted by learned counsel for the petitioners, which submission I adopt here. In *Re Castlereagh Securities Ltd* [1973] 1 NSWLR 624 the costs of objectors were paid by the company as the objections were properly raised. In *re Ampol Ltd* (1989) 14 ACLR 772 the circumstances showed it was not unreasonable for the objections and the court was properly given the benefit of arguments. In *Re Arrowfield Group Ltd* (1995) 17 ACSR 649 the matters raised were of considerable importance and so the company bore the costs.

[14] While this is the general approach the court has the final discretion in awarding costs. The general approach applies to objections which have been of some assistance or which have not 'lacked all substance' or which are not frivolous or which are of no assistance to the court and have served to delay the proceedings. Learned counsel for the petitioners cites *Re NRMA Ltd No 5131 of 1999* (2000) 33 ACSR 595 at para 45:

> (i) The ordinary rule is that the scheme companies pay the objector's costs and do not suffer cost orders against them;
>
> (ii) However this is subject to the objections not being frivolous or without substance but rather such as to be properly and justifiably advanced, even if unsuccessfully. I would add that even sensible objections should be capable of being advanced with reasonable economy of time, consistent with the summary nature of a s 411(1) application;
>
> (iii) These principles reflect the fact that the scheme procedure unavoidably must provide an independent court forum on two separate occasions —

for convening and then to approve the scheme. The court will often be assisted by having a contradictor at either stage …;

(iv) Where there is a clear indication that objectors are using the tactics of technical and artificial objection so as to stall a scheme of arrangement for their own purposes, the courts will not hesitate to make costs orders against objectors to the extent warranted; those cost orders may even be indemnity cost orders in appropriate cases; and

(v) Since assessment of the objections cannot be made in advance cost orders should not be made in advance either.

[15] And in *Re Matine Ltd* (1998) 28 ACSR 492 at p 494 it was held as follows:

> … It will be a temptation to objectors in future schemes to seek to use tactics of technical objection and delay on the supposition that the objectors have nothing at risk save the difference between party and party and indemnity costs; … It should be emphasised that where there is a clear indication of that, the courts could not hesitate to make cost orders against objectors to the extent warranted and those cost orders may be indemnity cost orders in appropriate cases …

[16] Relying on the foregoing, the petitioners and the respondents contend that MTB should bear the costs incurred by both the petitioners and the STL Lenders costs on the grounds that MTB's opposition to the TAS scheme of arrangement amounted to an abuse of the court's process, thereby protracting as well as adding costs and complexity to these proceedings at the respondents' and petitioner's cost. In other words it is contended that MTB's objections to the grant of sanction were unjustified, frivolous and without substance.

[17] MTB in response contends otherwise. It maintains that it was entirely justified in taking the objections it did. Relying on the case of BAT Industries plc; *BAT Industries plc and another v BAT Reconstructions Ltd* (3 September1998), MTB cites Neuberger J. In that case the company had petitioned the court for, inter alia, an order sanctioning a scheme of arrangement between the company and the holders of its ordinary shares pursuant to s 425 of the English Companies Act 1985 which is pari materia with s 176 of the Companies Act 1965. A contingent creditor objected to the sanctioning of the scheme alleging that the objectors had a legal claim against the company in the United States for substantial damages relating to diseases associated with tobacco products. These objections were made notwithstanding that the company itself was a holding company carrying on no tobacco business and indeed no business at all in the United States. The objectors failed as sanction was granted. In ordering costs Neuberger J (now President of the Supreme Court) stated as follows:

A … Mr Richards (for BAT) rightly points out that the dividend in specie (which is the objection raised by the objectors) is not part of the scheme of arrangement but a subsequent step … To my mind the fact that the objectors object to a consequence of the scheme does not prevent them from being heard and does not, at any rate without more, prevent them from having their interests taken into account …

B

[18] On the issue of costs:

… The difference between those cases and the present case is that those cases were concerned with members whose rights were being as it were compulsorily changed, C or whose shares were being compulsorily acquired, whereas in the present case we are concerned with potential creditors of the company whose rights are not being directly interfered with … *Bearing in mind that this is the first occasion where the question of costs in relation to objectors who are not members has been considered, and bearing in mind that members who object do so normally for their commercial reasons. I have decided that I should not make any order for costs …* D

[19] Accordingly MTB submit in similar vein, that given the nature of their objections which they maintain was necessary for a full and proper evaluation of the scheme, no order should be made against it and the general approach as E set out above should be adopted namely that the company bear the costs.

[20] Although all parties are agreed on the position in law, namely that the general approach would usually apply where objections are taken with a view to F assist the court and are not completely lacking in substance, MTB and the other parties diverge on this one issue, namely whether the objections taken by MTB were in fact justifiable and served to allow for a more rigorous examination of the scheme or in fact served no useful purpose but was contrived to delay the sanction and implementation of the scheme.

G

[21] The matter therefore turns on a consideration of the nature of MTB's objections and the manner in which they were put forward. If there was reasonable and justifiable basis for the objections and they served to clarify and assist the court to evaluate the scheme more fully then the costs ought to be H borne by the company. If however, the objections lacked substance, were prolix, and calculated to delay the sanctioning of the scheme then the costs ought not to be borne by the company in keeping with the general approach, but ought to be borne by MTB. If it follows that the costs are to be borne by MTB, then the basis on which such costs are to be awarded, namely a standard I basis or on an indemnity basis will then be considered.

Were the objections taken by MTB justifiable and warranted

[22] I have perused the respective submissions of all parties and considered

my written judgment. I concur with learned counsel for the petitioners and the second to 14th respondents that MTB's opposition to the sanctioning of the scheme was premised, as stated by learned counsel for the second to 13th respondents, on:

(a) issues that had already been decided at the hearing of the preliminary issue;

(b) new points of submission were taken orally that were not raised in the written submission and which necessitated adjournments; and

(c) further evidence was filed in the course of the hearing which again necessitated adjournments and replies.

[23] This had the net effect of causing considerable delay and the incurring of significant costs as additional cause papers had to be filed and research undertaken to meet the new points raised. Considerable judicial time was also undertaken in considering these various issues.

[24] For example the issue of priority was re-agitated although this had been fully determined in the course of the priority hearing. Res judicata came into play but by reason of the objection taken once again at the sanction stage, the court had to go through the entire issue once more before dismissing it. This was not a justifiable or reasonable objection to be ventilated.

[25] MTB also filed a civil suit with a view to effectively circumventing the effect of the priority ruling. This was the finding of the learned judge in the civil suit. Again it cannot be concluded that this objection was justifiable or in assisted the court to clarify or evaluate the scheme. In the sanction proceedings, 12 grounds of objections were raised including classification, disregard of the STL votes, that MTB was being coerced, that the scheme was unreasonable, illegal and various other procedural objections. I do not propose to set out them out here as this has already been considered in some detail in the course of the sanction hearing. Ultimately the court found that there was no merit in these objections and granted sanction.

[26] It appears to this court that the issues of priority, the civil suit, coercion of MTB, illegality and procedural objections did indeed lack justifiable basis. They did not appear to be objections taken with a view to genuinely evaluating the scheme, but rather with a view to stultifying or delaying the sanctioning of the scheme and seeking to procure priority in its own interests. The manner in which the objections were taken by MTB occasioned delay, and the incurring of significant costs. It had the net effect of delaying the sanctioning of the scheme which also incurred significant costs, which were mounting continually on a monthly basis. For this reason it appears that this is not a proper case in which to adopt the general approach. Many of the objections

taken were lacking in substance or devoid of merit, and noticeably so. It follows therefore, in line with the decision in the *NRMA*'s case and in *Re Matine Ltd* that this is a fit and proper case for the court to make cost orders against the objector, namely MTB to the extent warranted. Accordingly it is ordered that MTB bear the costs of the petitioners and the second to 13th respondents as well as the 14th respondent.

[27] The final issue for consideration is the basis for the award of such costs. Should the standard basis apply or should it be the indemnity basis. Having given anxious consideration to all the submissions filed by the parties I have concluded that costs should be ordered against MTB but on a standard basis order. This allows the court to assess costs such that a reasonable amount in respect of costs reasonably incurred will be allowed. I decided against the award of costs on an indemnity basis for the reason that although a great many of the objections were devoid of merit, there were some objections that were genuinely taken with a view to assisting the court. The fact that it was ultimately determined that those objections lacked merit does not in itself warrant an inference that all objections were taken mala fide.

[28] Accordingly I have considered the matters set out for the basis of assessment in O 59 r 16, notably items (a)–(g) and conclude that costs ought to be awarded as follows:

(a) the second to 13th respondents tendered a draft bill of costs. I allowed a sum of RM135,000 for getting up. They are also entitled to their full out of pocket expenses. Accordingly the *second to 13th respondent are awarded a sum of RM138,928.36 to be paid by MTB*;

(b) the petitioners sought a sum of RM150,000 on an indemnity basis. On standard basis, *the petitioners are awarded a sum of RM135,000 to be paid by MTB to the petitioners*; and

(c) the *14th respondent*, who largely adopted the approach and submissions of the second to 13th respondents *is awarded costs of RM25,000 on a standard basis, to be paid by MTB.*

[29] For the reasons cited above, MTB is therefore ordered to pay the costs as set out above to the petitioners and the second to 14th respondents.

MTB ordered to pay costs to petitioners and to second to 14th respondents.

Reported by Kanesh Sundrum